On June 9, 1943, petitioner presented his petition to the District Court of the United States at Chicago and was given leave to file it as a poor person (Tr. 2, 9).

The content of the petitions filed in other courts does not appear in the record. However, it did appear by the petition, that petitioner had been judicially declared insane before trial but showed no restoration proceeding. An alert judge obviously caught the significance of that fact and ordered the writ to issue as to give petitioner such constructive aid as the record might justify.

When the record was brought before the District Court it appeared that petitioner had been adjudicated insane and that there was neither jury trial, nor bench trial, had upon the question of petitioner's sanity before he was arraigned and required to plead, but that petitioner had been returned from the insane institution to the authorities of St. Clair County upon the observation and statement of a "Mental Health Officer" who said that he was "of the opinion that Mazy now shows no sign of mental disease and should be returned for trial" (Tr. 52).

The observations of that person would have been competent testimony before the Circuit Court had petitioner been tried for sanity before his arraignment for trial; but there was no trial of that issue.

A hearing was had in the District Court on the return of the Warden to the Writ of Habeas Corpus, and a stipulation of facts made (Tr. 69). This stipulation was to the effect that petitioner was adjudicated to be insane in September 1927 by the St. Clair County Circuit Court and without any judicial trial or judgment of restoration to sanity he was arraigned, and tried by the said Circuit Court, convicted, and sentenced to the Penitentiary for the crime

charged, and was then before the District Court in May 1944, under *mittimus* pursuant to that judgment.

The Attorney General of Illinois insisted that petitioner should be remanded to the penitentiary to continue service of the said sentence.

The Court discharged the prisoner.

The Attorney-General appealed to the Circuit Court of Appeals for the Seventh Circuit. The Court reversed the decision of the District Court.

The petitioner now prays for certiorari to review the decision of the Circuit Court of Appeals.

I.

IT IS A VIOLATION OF THE DUE PROCESS OF LAW PROVISION OF THE FEDERAL CONSTITUTION TO TRY, CONVICT, SENTENCE, AND IMPRISON AN INSANE PERSON, AND THE FEDERAL COURTS SHOULD DISCHARGE A PRISONER INSTANTER UPON SUCH A RECORD. HE SHOULD NOT BE FURTHER IMPRISONED TO RUN THE GAMUT OF THE STATE COURTS TO FINALLY GET TO THIS COURT ON CERTIORARI.

The Circuit Court of Appeals reversed this case because it considered that no federal question was presented and says that the decision of the District Judge was based on his own construction of the Illinois Statute.

On the contrary, the District Judge placed his reliance upon the construction which the Supreme Court of Illinois voiced in *People* v. *Preston,* 345 Ill. 11, where it was held that in cases under that statute, the discretion vested in

the trial judge as to procedure was withdrawn by the Illinois Statute and that the procedure must be a jury trial of the insanity issue (p. 16).

It is not being stressed here that petitioner did not get a *jury* trial of the issue of restoration to sanity, but the emphasis is on the fact that petitioner *got no trial,* by judge or jury, upon that issue; for the record shows that prior to trial the petitioner was adjudicated to be insane, and that without further judicial inquiry, petitioner was required to plead, was put to trial, convicted, sentenced, and imprisoned for life.

The Circuit Court of Appeals visions a State question only and says that it cannot say that the admitted facts so far transgress the requirements of due process as to raise a federal question; and further the opinion says that it cannot agree that the Illinois Statute requires a *jury* trial for restoration of sanity and that it was for the State courts to say whether the procedure followed was so defective as to deprive the Court of jurisdiction to render a valid judgment, and cites several cases in support of the point made.

But the cases relied upon by the Circuit Court of Appeals for its conclusions do not apply here. *Nobles* v. *Georgia,* 168 U. S. 398 was only a case of entering an order fixing a date under a mandate to resentence the defendant. *Simon* v. *Craft,* 182 U. S. 427 was an ejectment suit where the title to property was involved with an insanity proceeding of a prior owner. The procedure of adjdication was held valid under Alabama law and decisions. In re: *Moynihan,* 62 SW (2d) 410 (Mo.) was a habeas corpus to relieve the imprisonment where it was claimed the *judge* tried the issue instead of a jury, with no contention that the woman was sane. In re: *Blewitt,* 138 N. Y.

148, it was held that the judge had the discretion to say if the trial of sanity should be by *jury* or *judge*. In *Metaxos* v. *People*, 76 Colo. 264 the superintendent of an insane institution issued a probationary discharge and the county judge put him back without a new trial of the sanity issue.

In *Ferguson* v. *Ferguson*, 128 SW (Tex. Civ. App.) 632 no jury was asked and the *judge* tried the issue of sanity. In *State* v. *Rose*, 195 SW (Mo.) 1013, the defendant was adjudged insane and was caught feigning insanity and the hospital officials turned him back. It was held that there was no occasion to retry his sanity. In *People* v. *Rice*, 256 Pac. (Cal.) 450 the defendant was adjudicated insane and was ordered by some one to be returned from the asylum to the court for trial. To the objection that there had been no trial of restoration to sanity it was said that the defendant never raised the point below. The same idea is found in some of the other cases as if an insane defendant could raise a point of law or as if it were the duty of a lawyer trying the case to decide the point and make the objection.

The same idea is stated here by the Circuit Court of Appeals and it is said in its opinion that in his trial petitoner

> "was represented by counsel who raised no question as to the sufficiency of the administrative finding of sanity and discharge."

But here there was nothing even rising to the dignity of an administrative finding of sanity,—only the report of an observer; and on that report, and the request of the States Attorney of St. Clair County, the managing officer of the Chester State Hospital was authorized to discharge petitioner from that institution and return petitioner to the custody of the sheriff of St. Clair County. It was a com-

pliance with a request and not an administrative finding (Tr. 52). Such an arrangement could not set aside or disturb a judgment of the judicial department of the State of Illinois. Even the Governor of Illinois cannot change the character of a judicial sentence in an effort to commute it (*People* v. *Jenkins*, 322 Ill. 33).

The fact is, there is no ambiguity about the Statute here in question. It says in the most simple and direct language:

> "A person that becomes lunatic or insane after the commission of a crime or misdemeanor *shall not be tried for the offense during the continuance* of the lunacy or insanity." (Italics ours.)

The petitioner here was so tried.

The question is, naturally, when does insanity end?

The statute protects the insane during three periods: (1) becoming insane after the commission of an offense; (2) insanity after verdict and before judgment; (3) after judgment and before execution of sentence; and provides that in all three cases a jury shall be summoned and the question tried,

> "Whether the accused be at the time of impanelling insane or lunatic" (Tr. 71).

When petitioner became insane he lost his civil rights of independent action, to contract, to associations with others. A conservator must act for him. That is no ordinary judgment. It is binding on all. Private persons could not vacate it or destroy its effectivenes; only another judgment of equal dignity could restore citizenship rights and undo the legal effect of the judgment suspending those rights.

A distinction is to be noted between a *judgment restoring* an insane person *to reason*, and an *administrative order re-*

leasing from custody, a person who is under such an adjudication.

How persons shall be treated for the disease of insanity is a legislative question; such persons may be left with their families, or be given the run of an institution, or put behind bars, or even in a strait-jacket. They may be released to friends, or sent home. It all depends upon the law as enacted and circumstances. But all of the time the judgment of insanity is there and it is there until it is satisfied by an order of equal dignity; or, as is required in *criminal cases* in Illinois, until a jury says in a verdict that reason is restored and judgment is entered upon such verdict.

It is true administrative officers permit those restored, and partially restored, to be in the custody of their families and friends and to go out of the confining walls of the asylum. The Statutes permit this to be done. But that is not a *restoration* to civil rights and an adjudication of the fact that the person had been restored to reason.

Here the Circuit Court of Appeals says concerning petitioner's return to the prosecuting authorities of St. Clair County that it was *presumably* done pursuant to the routine of that service. But even so the routine of that service has no broader objective than confinement of an insane person for treatment. It has no judicial powers.

Nothing is said in the statute about an administrative officer reporting to the Court that it has the green light to try, sentence to life imprisonment, or lift the stay orders on execution in a capital case. What is said is:

> "In all of these cases, it shall be the duty of the court to impanel the jury to try the question whether the accused be, at the time of the impanelling, insane or lunatic."

We point out that it is just as imperative to try one for sanity who stands *adjudged* to be insane, as to try one for insanity who stands *accused* of being insane. What is wanted to be known is whether the person before the bar of justice is sane, so he may be tried or sentenced.

In a capital case it is easy to appreciate that the Court would not allow an accused who had been found by a jury to have become insane after judgment of death, be put to death upon the say-so of an observer that the condemned man had become restored to sanity. It is unthinkable. A jury would naturally be impanelled by any judge to try the tragic question. There is no difference in that instance from this case, except in degree, for the statute says "In all these cases," the question of sanity shall be tried.

The Supreme Court of Illinois Has Given a Settled Construction to the Statute.

We suggest that the Supreme Court of Illinois has definitely settled the questions here involved by its opinion in *People* v. *Scott*, 326 Ill. 327, and its later opinion of *People* v. *Preston*, 345 Ill. 11. In the *Scott* case he was convicted of murder and sentenced to be hanged. A petition was presented stating that Scott had become insane, a jury was impanelled to try the question, it found Scott to be then insane, and he was committed to Chester Asylum for insane until restored to reason, then to be returned to have the date of death fixed. A year later the officials of Chester Asylum reported that Scott had recovered his sanity. The States Attorney of Cook County on an unverified petition for writ of Habeas Corpus *ad subjiciendum* and pursuant thereto Scott was produced before the Court and ordered into the custody of the sheriff. After a heated controversy over procedural questions a jury found Scott

to be sane and he was resentenced to be hanged. On writ of error one of the questions was a construction of the statute here in question, as to whether the defendant was entitled to a jury trial upon the question of his restoration to sanity, in view of the fact that the statute is silent as to a trial upon the question of restoration to sanity after a defendant shall have been found to be insane.

The Court there said that a judgment upon a verdict of insanity is not conclusive evidence of his insanity at any other day or date,

> "but the judgment affords a presumption in favor of the defendant that he continued thereafter to be lunatic or insane until the contrary is legally established" (p. 338).

The Court further said that

> "We think from the various provisions of the statute that it should be interpreted as implying that the question whether or not the defendant has recovered from his insanity or lunacy should be passed on by a jury impanelled for the purpose, as was done in this case."

That was said in a capital case, but it as well applies to a life sentence. The degree of punishment does not change the principle involved.

The Court there remarked that the civil statute on lunatics (Chap. 86) had no application to criminal cases and that that statute so provided.

The Court there also said that good practice and sound reason demand that a verified petition should be filed showing a real foundation for the retrial of the defendant's sanity,

> "as the former judgment and finding that the defendant was insane carried with it the presumption that

> he continues to be insane until the contrary is legally established" (p. 340).

It was not therefore the interpretation by Judge Campbell of the Criminal Code of Ilinois that he was applying to the case but the very interpretation which the Supreme Court of Illinois had placed upon and which Judge Campbell was entitled to apply to the case as the fixed and definite law of the State. Judge Campbell quoted from the later case of *People* v. *Preston,* 345 Ill. 11, 16 that the discretion as to procedure had been withdrawn by the statute and a jury trial on restoration was mandatory.

The Circuit Court of Appeals admits that

> "an insane person cannot plead nor can he be sentenced. Violation of that rule would, without doubt, raise the federal question of violation of the due process requirements of our federal Constitution."

We respectfully suggest that that admission should have caused a different result in the Circuit Court of Appeals for the statement of law fits the facts of this case exactly; for here petitioner had been adjudicated to be insane, he was not tried again as to whether he had regained sanity, and he was required to plead while insane, and while insane was sentenced to life imprisonment.

The legal situation indicates a review here.

II.

THE PETITIONER EXHAUSTED HIS REMEDIES IN STATE COURTS AND THE DISTRICT COURT VIOLATED NO RULE AS TO COMITY IN DISCHARGING HIM.

There is grave doubt whether a Habeas Corpus Petition in perfect form would be availing in the courts of Illinois to furnish relief against the judgment here in question. The Habeas Corpus Statute, Chap 65 Illinois Revised Statutes provides in Section 22 the several causes for which a prisoner may be released. The first cause is:

> "1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person."

The other six paragraphs cover specific situations, none of which fit this case.

The Supreme Court of Illinois has construed paragraph 1 above quoted, to give relief only where there is no jurisdiction of subject matter or parties or no power to render the particular judgment (*People, ex rel,* v. *Hunter,* 369 Ill. 425; *People, ex rel.* v. *Fisher,* 372 Ill. 146). No question of fact is to be raised in the Supreme Court of Illinois which has original jurisdiction under the Constitution.

The Supreme Court of Illinois though vested by the Illinois Constitution with "original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases" (Article VI), has lately decided in *People ex rel. Swolley* v. *Ragen,* 390 Ill. 106, that it does not try questions of fact and that "any petition which raises questions of fact only will not be considered."

That ruling of the Illinois Supreme Court made necessary a change by this Court of the required procedural background to habeas corpus cases brought in District Courts where the release of State prisoners is sought on Constitutional grounds.

In *White* v. *Ragen*, 324 U.S. 760, 767, this Court construed that announcement to mean that the Illinois Supreme Court would not thereafter "entertain original applications for habeas corpus, save on a record which excludes on its face the possibility of any trial in that Court of an issue of fact." This Court there said that in such cases where the case had not obviously been decided on a federal ground, it was not necessary to apply to this Court for certiorari, and that such action by the Supreme Court of Illinois would excuse further action on that remedy.

While it is not clear from this record what was in the two habeas corpus petitions presented by petitioner to the Supreme Court of Ilinois, it could well be assumed, being the act of a layman, that it was the same petition in substance that was here presented.

Had the facts of this case been laid before the Supreme Court of Illinois, as they now exist in this record, that Court could have said, and would, no doubt, have said that the petition raised question *de hors* the record of petitioner's conviction, that called for a decision of fact, and would have denied the petition or would have dismissed it upon that theory.

If that inference be justifiable, why should the District Court stand upon ceremony and say that the Supreme Court of Illinois had not been applied to for relief on the admitted state of facts.

Why should it be necessary to apply to any court of Illinois for relief by habeas corpus when its Supreme Court, a Court of coordinate jurisdiction with the Circuit, Superior, and Criminal Courts, takes the position that it will not try questions of fact.

We believe this record presents an exception to the general rule and that this Court should take it and relax the rigid formality that requires a-round-the-clock pursuit of remedies, when the federal question sought for decision cries aloud its presence upon the record.

We suggest that the remedy by habeas corpus has here been exhausted by this layman petitioner's three efforts in the Supreme Court of Illinois, one effort in the Circuit Court of Will County, plus the open contention of the Attorney General that, regardless of the admitted fact of the trial of petitioner while under an adjudication of insanity, further imprisonment is the only program which the State, whose dignity he officially represents, has for petitioner's future.

The existence of the admitted facts in open court should call forth the power of the United States to protect its citizen in his Constitutional right, promptly and without the formality of circuitous procedure.

The remedy of error *coram nobis,* (Ch. 110 Se. 72 Ill. Rev. Stat.) is not available here. That remedy may be used only where there exists some matter of fact at the time of the trial not known to the court or the defendant, and which, if known, and presened, would have produced a different judgment. Here the fact that defendant was under adjudication of insanity was known to the judge and prosecuting attorney; they had participated in the original insanity proceeding (Tr. 34, 35, 36). If sane, petitioner knew

it. If under adjudication of insanity, he could not legally know it.

Nor would a motion to expurge the judgment be here available for the reason that once a prisoner commences the service of his sentence the trial court loses all jurisdiction over his person and the subject matter and is powerless to change or modify it (*People ex rel. McKinley,* 371 Ill. 90). The prisoner is then in the charge of the executive department.

The writ of error would not suffice for that remedy corrects only error appearing upon the face of the record of conviction and the matter complained of here is *de hors* the record.

The Court could not remand petitioner to the Warden for the reason his imprisonment was illegal; nor remand to the Menard hospital for the insane, for it held no *mittimus*; nor to the St. Clair County Circuit Court for it held no charge against petitioner. The Attorney-General claimed only the right to further imprison petitioner under the life sentence, and the only answer was a discharge from the custody of the Warden.

So, habeas corpus, being the only remedy available, and the record exhibiting a cause for discharge for lack of due process under the federal Constitution, why should petitioner be formally remanded back to imprisonment to be brought before some State court to see if it might, perchance, discharge petitioner; and, if not, for petitioner to come again to the District Court for discharge. The law does not favor circuity of action; hence, the only indicated procedure was a discharge from custody.

The action of Judge Campbell in striking down the illegal imprisonment was the ultimate justice of the situation.

III.

COMITY DOES NOT RESPECT A VOID JUDGMENT THAT HOLDS A CITIZEN IN A PRISON. THE CONSTITUTIONAL GUARANTY IS THE HIGHEST IN ORDER OF RESPECT. COMITY BEGINS AT HOME.

The Court had before it a citizen of the United States who was being held and imprisoned under void process, and also the highest law enforcing agency of the State of Illinois urging the continuation of that imprisonment The Judge could not believe that the doctrine of comity required him to remand petitioner to life imprisonment upon void process where the highest law enforcing officer of the State stood before him insisting that the imprisonment must continue. Rather, it would seem that the Judge felt that comity, like charity, begins at home, and that the doctrine required that the State of Ilinois should first respect and observe the basic law of the land before it might insist that its judgment before the Court be respected on the ground of comity.

Comity does not go to the absurd length of requiring that one judicial system should respect the void pronouncements of the other. On the contrary, the rule is that a void judgment may be attacked anywhere, any time, under any circumstance, collaterally or directly, in court or out, it matters not; any time before final judgment is entered upon the record.

Comity respects valid judgments, or judgments erroneous only, for they are valid till reversed, but never void judgments.

Because the highest prosecuting official of the State had no other program for petitioner than his continued im-

prisonment under the St. Clair County Circuit Court judgment, and wanted no other order, the Court discharged him.

The validity of that order of discharge is the subject matter here, and the Court should take the case for adjudication here.

IV.

CONCLUSION.

Mazy Was Entitled to Go Free.

As Mazy stood before the United States District Court as a sane person, he could not be remanded into the custody of the officials of the state hospital for the insane,—first, because he was sane; and second, that institution had discharged him and was not asking for him back, and he was not held under their custody; and third, it is unthinkable to remand a sane person to a lunatic asylum.

As the judgment was void, Mazy was held illegally by the warden. His detention papers were void and the warden had no right to Mazy's custody. A relator imprisoned without due process should not be remanded by a federal judge into the custody of the very state official who is violating the relator's Constitutional right to freedom. Comity requires no such useless action.

The State had no charge against Mazy. Its powers to prosecute Mazy under the St. Clair County indictment were exhausted and St. Clair County officials were not asking for Mazy's custody.

Nothing stood between Mazy and freedom except, maybe, some technical objections as to fruitless efforts in State courts to be released, which were as nothing in the presence of justice.

So the District Court having before it one who was admittedly being held in violation of his Federal Constitutional rights, it would have been a useless gesture to remand Mazy into the custody of the State, or any of its officials, on the idle theory that he must file some more Habeas Corpus suits, or writs of error, or Error *Coram Nobis* proceedings so as to exhaust remedies acknowledgedly useless.

The law requires no useless thing to be done.

Wherefore, it is respectfully suggested that in the interest of justice and to vindicate the supremacy of the guaranteed rights to citizens of the United States against encroachments upon their fundamental liberties, the Writ of Certiorari should be granted as prayed.

All of which is respectfully submitted.

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